Supreme Court U.S.
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No. 02-892

IN THE

Supreme Court of the United States

KIMBERLY LACEWELL BENNETT,

Petitioner,

v.

ALLFIRST BANK, formerly known as
THE FIRST NATIONAL BANK OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Allfirst Bank, formerly known as The First National Bank of Maryland, is wholly owned by Allied Irish Banks, P.L.C.

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INTRODUCTION

The Petitioner appeals the final judgment entered in her favor after a civil trial before the Circuit Court of Maryland for Prince George's County ("Trial Court"), Judge James J. Lombardi presiding. The trial took place on May 21, 2001. The Petition for Writ of Certiorari ("Petition") contends that the Trial Court erred in striking the Second Amended Complaint, and that the Maryland Court of Special Appeals erred in affirming the Trial Court's judgment. The Maryland Court of Appeals denied the Petitioner's Petition for Writ of Certiorari.

a. Response to Petitioner's Statement of the Case

The Petitioner sets forth a lengthy statement of the case. Unfortunately, the statement is confusing, disjointed, incomplete and misleading. It is important to note that the Petitioner fails to cite pleadings, briefs, hearing transcripts or other evidence to support her allegations and conclusions.

b. Brief Overview of Case

The Petitioner (Plaintiff in the Trial Court), Kimberly Lacewell Bennett ("Bennett"), sued the Respondent, Allfirst Bank, formerly known as The First National Bank of Maryland ("Allfirst"), due to Allfirst's mishandling of a certified check in October of 1995. Allfirst's mistake caused a series of checks written on the Petitioner's commercial escrow account to be dishonored. After the mistake was discovered, Allfirst took all action within its power and all action requested by the Petitioner to rectify the situation. Allfirst paid all of the returned checks; agreed to pay all associated bank fees; and sent letters to all effected parties explaining that the mistake was Allfirst's and not the Petitioner's.

On September 30, 1998, the Petitioner filed the Complaint in the Trial Court alleging causes of action for negligence, wrongful dishonor pursuant to the Maryland Code Annotated, Commercial Law Article, section 4-402 ("UCC 4-402"), breach

of contract, negligent breach of contract, and defamation. The causes of action for negligence, negligent breach of contract and defamation sought punitive damages. Upon motion by Allfirst, the Trial Court dismissed the three causes of action seeking punitive damages.

At the close of the discovery period that was extended on two occasions at the Petitioner's request, and over five years after the relevant events occurred, the Petitioner filed the Amended Complaint, and a little over one month before trial, filed the Second Amended Complaint. The Second Amended Complaint added numerous causes of action and substantially changed the nature of the litigation. Upon motion by Allfirst, the Trial Court struck both amended complaints. The remaining causes of action for breach of contract and wrongful dishonor pending in the Complaint were tried before the Trial Court on May 21, 2001.

Allfirst has admitted its mistake since October of 1995. The only issue to be determined at trial was the extent of damages, if any, suffered by the Petitioner. After a trial on the merits, the Trial Court found that the Petitioner did not suffer any direct damages and awarded consequential damages for emotional harm in the amount of $3,000. The Trial Court also found that Allfirst's mistake was unintentional and that no representative of Allfirst knew of the mistake until the Petitioner appeared in the bank to research her account and determine the nature of the problem. The Trial Court found that Allfirst took all action within its power to rectify the situation.

The Petitioner did not challenge the Trial Court's findings before the Court of Special Appeals and does not challenge them now. Curiously, the Petitioner asks this Court to reconsider the decision of the Trial Court to strike the Second Amended Complaint, and the Court of Special Appeals' affirmance of that decision, but she did not attach any of the relevant documents to her Petition.

c. Jurisdiction

The Petitioner asserts that the Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. § 1257. That statement is inaccurate. As difficult as it is to discern precisely what the Petitioner is complaining about, it is clear that the Petition does not challenge the validity of any federal statute. The Petition does not challenge any court's interpretation of the United States Constitution or any federal statute. As best as can be determined from the Petition, it seems that the Petitioner claims that the Trial Court violated Rule 2-341 of the Maryland Rules of Civil Procedure in striking the Second Amended Complaint and that there may have been discovery abuses. Although both of these points are vigorously disputed, it is clear that neither issue gives rise to jurisdiction in the Supreme Court of the United States under 28 U.S.C. § 1257.

d. Rule 15.2 List of Misstatements of Facts and Law

The Respondent maintains that most if not all of the assertions in the Petition are incorrect and are unsupported by any citations to the record. The Petition states many conclusions of fact and law that were not litigated in the courts below. For that reason, it is extremely difficult to point out all of the misstatements. This section, however, attempts to illuminate the more glaring and blatant misstatements in the Petition.

- On Page 1 of the Petition, the Petitioner states that Allfirst "deceptively dishonored 32 attorney escrow checks. . . ." The trial court explicitly found that there was no deceptive behavior on behalf of any Allfirst representative.

- On Page 1 of the Petition, the Petitioner states that the dishonoring of the checks was "accomplished by known violation of federal law of reversing 'UCC Paid items'. . . ." There was no evidence of any "known" violation of federal

law and the Trial Court explicitly found that no Allfirst representative knew of the mistake until it was discovered on October 16, 1995, when the Petitioner appeared in the Allfirst branch to determine the nature of the problem with her account.

- On Page 1 of the Petition, the Petitioner states that federally insured funds were removed from the Petitioner's account for 14 days. There is no evidence or finding as to whether the funds were federally insured, and the total amount of the dishonored checks was returned the Petitioner's account immediately, not 14 days later.

- On Page 2 of the Petition, the Petitioner states that there was a balance remaining that was sufficient by "federal law" to pay 31 of the 32 dishonored checks. There was never any evidence, finding, discussion or argument regarding this point. Although it is difficult to discern the Petitioner's argument, it appears that she is arguing that the dishonoring of the checks violated the UCC, not federal law. Allfirst, of course, has always admitted that it wrongfully dishonored the checks pursuant to Section 4-402 of the UCC.

- On Page 2 of the Petition, the Petitioner states that there were two systems of final payment of checks. The Petitioner never offered any evidence at trial relating to this purported dual system. The Petitioner also never offered any evidence at trial relating to her assertion that bank officers were permitted to reverse UCC paid items.

- On Page 2 of the Petition, the Petitioner's statement that she received the banking manuals

belatedly is inaccurate. Allfirst had long before produced the relevant portions of the manual. Allfirst produced its entire five volume 1995 manual and its entire two volume 1998 manual after the Court granted its motion for a confidentiality order to which the Petitioner had refused to agree. The delay caused by the Petitioner was approximately two months. The Petitioner's recount of the discovery hearings is likewise inaccurate, but she fails to attach any relevant transcripts to the Petition.

- On Page 3 of the Petition, the Petitioner states that she received 5,500 pages of "disorganized manual provisions." To the contrary, the manual provisions were produced in the exact order that the pages appear in the manual and they were professionally copied.

- On Page 3, the Petitioner refers to reversal of UCC Paid items, but this concept was never litigated. There was no evidence presented on the issue and there are no court rulings relating to reversal of UCC Paid items. There likewise was no evidence or finding that security licensed branch officials were permitted to reverse items "federally mandated for payment in a deliberate and consistent course of conduct." These statements are simply examples of unsupported conclusions relied upon by the Plaintiff.

- On Page 7 of the Petition, the Petitioner states that the retail overdraft system gave security licensed officers the ability to violate federal law. That paragraph is not part of the deposition quote as it appears to be in the Petition. There was no evidence offered at trial relating to this conclusion and there is no court ruling to support the conclusion stated by the Petitioner.

- On Pages 9 and 10 (paragraphs 39-50) of the Petition, the Petitioner quotes the Second Amended Complaint. Allfirst disputes the conclusions set forth in the Second Amended Complaint and maintains that the Second Amended Complaint would not have survived a motion to dismiss, let alone the motion to strike as provided for by Rule 2-341 of the Maryland Rules of Civil Procedure. No evidence or rulings in the record relate in any manner to these issues.

- On Page 10 of the Petition, the Petitioner states that Allfirst's General Counsel, Nancy Miller, endorsed and caused to be mailed letters espousing false pretenses. The letters referenced were letters requested by the Petitioner apologizing to the Petitioner's customers for Allfirst's mistake. The letters contained explicit language demanded by the Petitioner. That is an admitted and undisputed fact. The statement in the Petition is simply a veiled attempt to plead a predicate act under RICO.

- On Page 11 and 12 of the Petition, the Petitioner purports to quote documents, but the source and accuracy of the quote cannot be determined as the documents are not made a part of the Petition.

- On Page 13 of the Petition, the Petitioner states that a review of the escrow account "reveals some egregious final clearing practices." The concept of "final clearing practices" was never an issue in this litigation. It was never a subject of discovery. No evidence was offered at trial relating to final clearing practices and there are no rulings of law in the record relating in any manner to Allfirst's final clearing practices.

- On Page 16 of the Petition, the Petitioner refers to alleged discovery abuses. There were no discovery abuses by Allfirst as it fully complied with its discovery obligations and fully complied with all orders of the Trial Court. As set forth below in this Brief, the Petitioner did not comply with her discovery obligations. It is not a coincidence that both the Maryland Court of Appeals and the Maryland Court of Special Appeals remained "fully and completely silent on the discovery" issues as indicated in the Petition.

- On Page 17 of the Petition, the Petitioner states that Judge Smith "stated that he would personally resolve the Motion to Strike the Second Amended Complaint." Judge Smith made no such statement and there is no transcript in the record to support the allegation.

- On Page 18 of the Petition, the Petitioner states that Judge Smith learned the true reason for the dishonoring of the checks. The meaning of that statement is unclear as the Trial Court made explicit findings as to why the checks were dishonored. There is no reference to any statement and no transcript is cited to support the statement in the Petition.

- On Page 19 of the Petition, the Petitioner states that Allfirst was required to keep teller settlement records. The concept of a "teller settlement record" was never litigated and the mere existence of such a record was never even established by the Plaintiff. Allfirst produced all records relating to the account at issue despite the Petitioner's protests to the contrary.

- On Page 19 of the Petition, the Petitioner states the conclusion that Allfirst used a "false pretense . . . to legitimize" the dishonoring of the checks. To the contrary, Allfirst has always admitted that it wrongfully dishonored the checks and the Trial Court made explicit findings that Allfirst did not engage in any intentional, dishonest or fraudulent conduct. The Petitioner, to her detriment, never produced any evidence of having actually suffered any direct damages as a result of the wrongful dishonors.

- On Page 20 of the Petition, the Petitioner states that the Trial Court was "quite confused" about the improperly certified check. To the contrary, the Trial Court found, as had always been admitted by Allfirst, that the checks were wrongfully dishonored. The Petitioner never presented any evidence at trial to support her position that the checks were wrongfully dishonored for any reason other than that found by the Trial Court. Of course, the Petitioner provides no basis for her assertion.

- On Page 20 of the Petition, the Petitioner states that the Trial Court did not continue this action in order to allow her to proceed on the Second Amended Complaint. The Petitioner never requested a continuance.

- On Page 21 of the Petition, the Petitioner states that "the remedial measure shows that with federal compliance, 31 checks would have been paid irrespective of the results of an improperly certified check used as a guise to take property from a federally insured institution by false pretenses." This statement is conclusion that is

unsupported by reference to any facts or rulings of law in the record. The issue was never litigated below.

- On Page 22 of the Petition, the Petitioner states that the Respondent "continues to contend that in 1995, $65,555.08 was 'insufficient' to pay 31 checks totaling $41,609.57." That statement is completely false. The Respondent has never made a contention one way or another as to whether $65,555.08 is greater than $41,609.57. Rather, since the relevant events occurred, Allfirst has admitted that it wrongfully dishonored all of the checks. The Petitioner never produced any evidence of direct damages as a result of the wrongful dishonors and the Petitioner never produced any evidence that the mistake somehow occurred as a result of intentional or fraudulent conduct.

- On Page 22 of the Petition, the Petitioner refers to "Corporate Corruption." There was never any evidence presented at trial relating in any manner to "Corporate Corruption." As quoted in the Petition itself, the Trial Court found no evidence of any deceptive behavior, intentional wrongdoing or any kind of fraudulent conduct.

- On Page 22 of the Petition, the Petitioner refers to "admitted violations by bank officers of a system of reversing UCC Paid items." The Petitioner provides absolutely no basis for the assertion. There were no admitted violations of federal law. Rather, as set forth above, Allfirst has always admitted that it mistakenly and wrongfully dishonored checks pursuant to Section 4-402 of the UCC. The Petitioner apparently now claims that Allfirst violated the

National Bank Act, yet she fails to illuminate exactly what provision Allfirst violated and how it violated the act. The Petitioner does not allege that the National Banking Act is invalid in any manner or that any Maryland court misinterpreted the act.

- On Page 25 of the Petition, the Petitioner references John Rusnik, a former employee of Allfirst whose gross negligence was a news story. The circumstances surrounding Mr. Rusnik were never an issue in this case and reference to him is irrelevant and inappropriate.

- On Page 29 of the Petition, the Petitioner states that by accepting Allfirst's admission of liability in striking the Second Amended Complaint, the Petitioner was foreclosed from being able to present the deceptive nature of the dishonors. That statement is completely inaccurate. The Trial Court's striking of the Second Amended Complaint was not an acceptance of Allfirst's admission of liability. More importantly, Section 4-402 of the UCC for Wrongful Dishonor allows a Plaintiff to recover punitive damages. The Petitioner did not present any evidence of any deceptive, intentional or fraudulent behavior at trial. The Trial Court made explicit findings that Allfirst did not engage in any deceptive, intentional or fraudulent conduct. The Plaintiff had an opportunity to recover exemplary damages under the causes of action that went to trial, but she failed to meet her burden.

e. Issue on Appeal

In the Petition, the Petitioner frames the "question presented" for appeal as follows:

> The question presented is whether based upon the fraudulent concealment doctrine, did the trial court and Court of Special Appeals err in striking the RICO cause of action, where Allfirst Bank deceptively dishonored thirty-two attorney escrow checks utilizing a system of final payment which knowingly violated federal law (reversal of UCC Paid Items and the aggregating of overdrafts) and not due to the lawful effects of an improperly certified check as pleaded and as discovered in the bank's internal manual and deposition testimony of participating officers of the bank on overdraft duties.

Petition, pg. i.

REASONS FOR DENYING THE PETITION

I. The Trial Court Did Not Abuse Its Discretion in Striking the Second Amended Complaint.

A. Standard of Review

The issues relating to the striking of the amended complaints were fully briefed in the Trial Court. As demonstrated in the transcript of the hearing before Judge Lamzell Martin, Jr., on May 17, 2001, and in the underlying briefs, there was lengthy argument on the issues and Judge Martin made a reasoned and fully informed decision.

As the relevant case law makes clear, trial judges have substantial discretion to allow or deny the amendment of pleadings. The exercise of discretion by the trial judge will not be overturned unless the trial judge abuses his or her discretion. *Residential Realty Corp. v. Bancroft Homes Greenspring Valley,*

Inc., 126 Md. App. 294, 728 A.2d 783 (1999); *Mattvidi Assocs. Lim'd Partnership v. Nationsbank, N.A.*, 100 Md. App. 71, 639 A.2d 228 (1994); *Perlmutter v. Minskoff*, 196 Md. 99, 75 A.2d 129 (1950) (stating the relevant standard is abuse of discretion).

B. Response to Petitioner's Argument

The Petitioner's argument as to why the Trial Court erred in striking the Second Amended Complaint is unclear. The Petition references only one of the ten new causes of action pled in the Second Amended Complaint, and that reference is vague at best. Judge Martin struck the Second Amended Complaint based on Rule 2-341 of the Maryland Rules of Civil Procedure as he found that prejudice would be imposed on Allfirst if it was forced to defend the Second Amended Complaint. Judge Martin did not address the statute of limitations issues raised. The Court of Special Appeals, however, ruled that the Second Amended Complaint was barred by the statute of limitations.

i. Rule 2-341 Analysis

The Second Amended Complaint added ten new causes of action to the litigation approximately 1 ½ months before trial and approximately 5 ½ years after the relevant events occurred. The new causes of action purported to change the nature of the litigation significantly. The paramount change from the Complaint to the Second Amended Complaint was the addition of RICO claims and other causes of action based on intentional misconduct. Only breach of contract and the UCC 4-402 claim were previously pending. The following is a paraphrasing of the briefs filed in the Trial Court in support of Allfirst's Motion to Strike the Second Amended Complaint.

a. RICO Generally.

The RICO statute was intended to eradicate organized crime. *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. den'd*, 420 U.S. 925, 95 S. Ct. 1121, 43 L. Ed. 2d 395.

RICO liability is based upon criminal enterprises and a pattern of racketeering activity. To prove a pattern of racketeering activity under RICO, the Petitioner must prove that Allfirst committed at least two predicate racketeering acts, that the predicate acts are related, and that the racketeering activity amounts to or poses a threat of continued criminal activity. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989); *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130 (4th Cir. 1993), *cert. den'd*, 510 U.S. 1197, 114 S. Ct. 1307, 127 L. Ed. 2d 658. Racketeering activity, among other things, includes threats of murder, kidnapping, gambling, arson, robbery, bribery, extortion, drug trafficking, bribery, counterfeiting, theft, embezzlement, extortionate credit transactions, mail fraud, and obstruction of justice or criminal investigations. 18 U.S.C. § 1961 (1984).

b. The RICO claims were properly stricken under Rule 2-341.

The RICO claims attempted to introduce into this case a completely new legal theory of recovery and a new fact pattern that had not been explored in discovery. Furthermore, the nature of the Petitioner's RICO claims are not discernible from the Second Amended Complaint. It would have been incredibly prejudicial to Allfirst to force it to defend the RICO claims without having had an opportunity to challenge the pleading of those claims, to explore the nature of the claims in discovery, and to file an appropriate dispositive motion. Allfirst would have been completely unable to prepare for trial adequately.

Rule 2-341 provides a procedure to strike amended complaints precisely to avoid this type of situation. The Petitioner was attempting to engage in trial by ambush by changing the nature of the case on the eve of trial after the close of the twice extended discovery period.

c. The Second Amended Complaint would not survive a motion to dismiss.

Without fully briefing the pleading deficiencies of the Second Amended Complaint, a cursory review demonstrates that it would not survive a motion to dismiss.

First, to plead elements sounding in fraud as the Plaintiff's RICO claims do, the Petitioner must plead those issues with particularity. The Second Amended Complaint fails to plead any facts in support of the legal conclusions asserted, let alone pleading facts with particularity.

Second, the Petitioner fails to plead even one predicate racketeering act let alone two as required by RICO. *Schultz v. Rhode Island Hosp. Trust Nat. Bank*, 94 F.3d 721 (1st Cir. 1996); *McDonald v. Schencker*, 18 F.3d 491 (7th Cir. 1994) (stating that multiple acts over a period of time committed for a single purpose do not establish continuity needed for pattern of racketeering). The Petitioner alleges breach of fiduciary duty (which also would not survive a motion to dismiss or for summary judgment), but a breach of fiduciary duty is not a predicate act under RICO. *Manion v. Freund*, 967 F.2d 1183 (8th Cir. 1992), *rehearing den'd*. The Petitioner identifies a cause of action as one for mail fraud, but the facts alleged do not in any way support a cause of action for mail fraud. Mail fraud is not a predicate act unless it is sufficiently pled. *McDonald v. Schenker*, 18 F.3d 491 (7th Cir. 1994). *See In re Burzynski*, 989 F.2d 733 (5th Cir. 1993); *Eastern Pub. and Advertising Inc. v. Chesapeake Pub. and Advertising, Inc.*, 895 F.2d 971 (4th Cir. 1990), *cert. den'd*, 497 U.S. 1025, 110 S. Ct. 3274, 111 L. Ed. 2d 784, *cert. den'd*, 498 U.S. 819, 111 S. Ct. 65, 112 L. Ed. 2d 39.

Third, the Petitioner does not allege any RICO enterprise. The bank and its employees are associated only by their banking activities and cannot together constitute a RICO enterprise. *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438

(5th Cir. 1987), *cert. den'd*, 483 U.S. 1032, 107 S. Ct. 3276, 97 L. Ed. 2d 780; *Mery v. Universal Sav. Ass'n*, 737 F. Supp. 1000 (S.D. Tex. 1990); *H.G. Gallimore, Inc. v. Abdula*, 652 F. Supp. 437 (N.D. Ill. 1987); *Witt v. South Carolina Nat. Bank*, 613 F. Supp. 140 (D.C.S.C. 1985). A person charged with RICO cannot also be the RICO enterprise. The Petitioner must plead an enterprise and the members of the enterprise. *Charles River Data Systems, Inc. v. Oracle Complex Systems Corp.*, 788 F. Supp. 54 (D. Mass. 1991); *Zahra v. Charles*, 639 F. Supp 1405 (E.D. Mich. 1986).

Finally, Allfirst cannot be liable for the acts of its employees under a theory of respondeat superior or vicarious liability. *Laro, Inc. v. Chase Manhattan Bank*, 866 F. Supp. 132 (S.D.N.Y. 1994), *aff'd*, 50 F.3d 810; *Prochaska & Associates, Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 798 F. Supp. 1427 (D. Neb. 1992); *Collective Federal Sav. v. Creel*, 746 F. Supp. 1307 (M.D. La. 1990). The Petitioner must allege the specific racketeering activities engaged in by the individuals involved or official conduct of the bank constituting racketeering activity. The Petitioner completely fails to do so.

The Second Amended Complaint will not survive a motion to dismiss, and it will not serve the interests of justice or judicial economy to allow the Petitioner to proceed to prosecute the Second Amended Complaint.

d. Count IV of the Second Amended Complaint, for breach of the covenants of good faith and fair dealing, essentially restates Count III of the Complaint for breach of contract.

The Petitioner has had a cause of action for breach of contract pending since the original Complaint was filed. Implied in every contract is a duty of good faith and fair dealing. By alleging the new cause of action, the Petitioner simply duplicated her theory of recovery that was already set forth in

the cause of action for breach of contract in the original Contract. The Petitioner will not be prejudiced if the cause of action is stricken.

e. Counts VIII and IX of the Second Amended Complaint allege causes of action pursuant to the state and federal consumer protection acts respectively, again adding new legal theories and presumably new factual bases for the claims.

Counts VIII and IX of the Second Amended Complaint add causes of action pursuant to the "Maryland Consumer Protection Act" and the "Federal Deceptive Trade Practice Act." The Petitioner does not allege, however, the statutory bases for the causes of action. Allfirst is left to speculate as to the specific causes of action being pled and the statutes upon which they are based.

Like the RICO causes of action, the Petitioner has added completely new legal theories and presumably new factual bases for recovery under the two acts. (The Petitioner did not plead any specific facts in support of these claims.) It is completely inappropriate for the Petitioner to amend her complaint to add new legal theories and new factual bases for recovery on the eve of trial. Md. R. Civ. Pro., R. 2-341 (2001). Allfirst would have been unfairly prejudiced if it were forced to defend these statutory causes of action without adequate notice of the claims and an opportunity to explore the claims in discovery.

f. Count XI (there is no Count X in the Second Amended Complaint) is for "Breach of General Duty of Care" which presumably is a cause of action for negligence. The Petitioner had a cause of action for negligence set forth in the Complaint and it was dismissed by the Trial Court.

The Petitioner states in a conclusory manner that Allfirst breached its "general duty of care." Count XI is unclear as to what cause of action is being alleged, but it sounds in negligence. The Petitioner had filed a cause of action for negligence as Count I of the Complaint, and that cause of action was dismissed by Order of the Trial Court dated January 11, 1999. It is inappropriate for the Petitioner to attempt to revive her cause of action for negligence through the filing of a nondescript cause of action in an amended pleading.

g. Counts XII and XIII are for breach of fiduciary duties, which like the previous causes of action, add new legal theories and factual bases for recovery, and will not survive a dispositive motion.

Counts XII and XIII of the Second Amended Complaint allege causes of action for breach of the duty of loyalty and for breach of fiduciary duty. The Petitioner entered into a simple banking contract with Allfirst which did not impose any fiduciary duties upon Allfirst. The Second Amended Complaint fails to allege the source of the alleged fiduciary duties and there are no facts in the record suggesting that Allfirst Bank had any fiduciary obligation to the Petitioner.

Regardless of whether or not there was a fiduciary duty owed by Allfirst to the Petitioner, the Petitioner was attempting to allege new legal theories of recovery which rely upon new factual bases that Allfirst did not have an opportunity to explore

in discovery. It is completely inappropriate for the Petitioner to attempt to expand the scope of this litigation significantly after the close of discovery and on the eve of trial.

h. Conclusion.

It is apparent that it would have been impossible for Allfirst to provide a meaningful defense to the multiple claims set forth in the Second Amended Complaint at a trial that was firmly scheduled to take place less than 12 months after the Second Amended Complaint was filed. Furthermore, if the Trial Court did not strike the Second Amended Complaint, Allfirst would have been denied the basic procedural rights to challenge the pleading, to explore the claims in discovery, and to test the legal sufficiency of the evidence through a motion for summary judgment. The unfair prejudice to Allfirst is readily apparent.

The matter of *Berry v. Department of Human Resources* is a case based on a similar procedural history as the case *sub judice*. In *Berry*, the Court of Special Appeals stated as follows:

> . . . In striking the amended complaint, the court noted:
>
> > *By waiting so long, Plaintiffs effectively prevented the Defendant[s] from investigating the Amended Complaint or issuing new discovery requests, as the Scheduling Order required that all discovery be completed by April 16, 1990. . . .*
> >
> > *By allowing the Plaintiffs to file an amended complaint at this point in time, all of the enormous time and expense the parties in this Court have given to the Motion to Dismiss, Motion for Reconsideration, and now the Motion for Summary Judgment would be laid to*

> *waste. Further, it would make a mockery of the Scheduling Order, as Plaintiffs themselves recognize it would have to be totally revised to accommodate the Amended Complaint.*

The court was also aware that the plaintiffs had had plenty of time to prepare their case and develop their facts. . . . This is not a case, then, in which the plaintiffs were subjected to unduly stringent time requirements that they could not meet. . . .

It is true, as plaintiffs allege, that MD. Rule 2-341(c) states that amendments to a pleading "shall be freely allowed when justice so permits," *but that has to read in conjunction with Rule 2-504(c), which provides that a pre-trial scheduling order "controls the subsequent course of the action but may be modified by the court to prevent manifest injustice." The court's action here was not taken in blind, arbitrary allegiance to its scheduling order, but rather to prevent what it regarded would be an injustice.* The concern was not over the fact of the amendments but their timing. The plaintiffs were not precluded from amending their complaint. *They were precluded from amending it nine weeks after they said it would be amended when, in the meantime, the defendants and the court were led into devoting their energies and resources into dealing with what remained of the initial complaint. We find no abuse of discretion.*

Berry v. Department of Human Resources, 88 Md. App. 461, 594 A.2d 1258 (1990) (emphasis added).

ii. Statute of Limitations Analysis

As set forth above, Judge Martin did not even address the statute of limitations issues. The Court of Special Appeals, however, ruled that the Second Amended Complaint was filed after the statute ran. The Second Amended Complaint was filed approximately 5 1/2 years after the relevant events occurred. The new causes of action alleged therein are barred by the applicable statute of limitations.

The gravamen of the Second Amended Complaint is the alleged RICO violation by Allfirst. The statute of limitations applicable to RICO claims is three years. *See Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984); *Kirschner v. Cable/Tel Corp.*, 576 F. Supp. 234 (E.D. Penn. 1983); *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F. Supp. 673 (N.D. Ind. 1982). There can be no doubt that the RICO claims are barred by the applicable statute of limitations unless they are found to relate back to the Complaint. A cause of action relates back *only if facts were pled in the initial pleading providing the defendant with sufficient notice of the claims that are restated in the amended pleading. Cline v. Fountainrock Lime & Brick Co.*, 214 Md. 251, 258, 134 A.2d 304 (1957); *Morrell v. Williams*, 279 Md. 497, 366 A.2d 1040 (1976); *Gensler v. Korb Roofers, Inc.*, 37 Md. App. 538, 378 A.2d 180 (1977).

It strains credulity to suggest that Allfirst was provided notice of RICO claims in the Complaint. RICO is a complicated statute based upon egregious conduct and it provides for the trebling of actual damages and for exemplary damages. As set forth above, to plead a cause of action pursuant to RICO, the Petitioner must plead a "pattern of racketeering" and at least two instances of racketeering activity. In addition, the requisite pattern requires a showing of a relationship between the predicate acts and a threat of continuing criminal activity. The racketeering activity must be performed for the purpose of obtaining a benefit to the perpetrators. *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229, 109 S. Ct. 2893,

106 L. Ed. 2d 195 (1989); *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130 (4th Cir. 1993). It would also be helpful to reference the statute.

There can be no doubt that the Petitioner made no such allegations in the Complaint. In the Complaint, the Petitioner does not allege any racketeering activity; she does not allege a pattern of racketeering activity; she does not allege a RICO enterprise; she does not allege any income derived by or benefit to Allfirst; and she does not allege any threat of continuing criminal activity.

The only causes of action pending from the initial Complaint were for breach of contract and the statutory tort of wrongful dishonor. Undoubtedly, the RICO claims involve proof of additional facts and require different elements of proof than the underlying claims pled in the Complaint. In addition, they significantly increase Allfirst's exposure to claims for damages that did not exist under the Complaint. In accordance with the doctrines of relation back and notice pleading, there can be no doubt that the claims set forth in the Second Amended Complaint do not relate back and should be stricken. Notice pleading is a simple standard to satisfy, but it is evident that the Petitioner fails completely to meet this standard as it applies to determining whether the Second Amended Complaint relates back to the Complaint.

iii. UCC Issues Raised in the Petition

As set forth above, Allfirst has always admitted that it wrongfully dishonored the checks written on the Petitioner's account. Allfirst has maintained that by failing to punch a hole in the MICR line in the certified check, that the Petitioner's account was improperly debited twice for the same check, thereby causing the artificially low balance and the wrongful dishonor of checks that should have been paid. The Trial Court also specifically found that Allfirst's failure to punch the hole proximately caused the checks to be dishonored wrongfully.

In the Second Amended Complaint, the Petitioner expounds on a new theory explaining why the checks should not have been dishonored. Under the Petitioner's new theory, when a bank considers whether or not to return a series of checks, the UCC requires that the bank credit the account in the amount of the largest check returned after that check is returned. Then each of the remaining checks is compared to the account balance one at a time under the same process to determine whether it should be paid. The checks presented on a single day should not be compared as a group. Under the Petitioner's theory, if Allfirst had employed this technique, only 1 of the 32 checks would have been returned.

If the Petitioner is correctly stating the UCC requirements, she is simply stating another basis upon which it can be found that Allfirst wrongfully dishonored checks 2 through 32. Allfirst has always admitted that it wrongfully dishonored checks 2 through 32, as well as the first check. It is irrelevant whether or not there is a second explanation for why the dishonors were wrongful.

The Second Amended Complaint, however, goes a step further and alleges that Allfirst dishonored these checks intentionally and for its own benefit. All allegations are conclusions, however, and there are no specific factual allegations set out in the Second Amended Complaint to support these conclusions. The Petition does not cite any specific allegations in the Second Amended Complaint, any evidence in the record or any evidence offered at trial to support these conclusions.

The relevance of the Petitioner's argument is unclear. The Petition fails to reference any order of the Trial Court relating to the UCC that is at issue. The issue to be determined by this Court is whether or not the Trial Court abused its discretion in striking the Second Amended Complaint. Based on the preceding analysis of the Second Amended Complaint

and the timing of its filing, it is apparent that the Trial Court did not abuse its discretion in striking in the Second Amended Complaint.

iv. Discovery Issues Raised by the Petitioner

The Petitioner states in a conclusory manner that Allfirst thwarted her discovery efforts, and as a result, she was not able to prepare and file the Second Amended Complaint until April 4, 2001. This statement is factually incorrect and illogical.

a. The Petitioner's Assertion is Factually Incorrect.

Allfirst complied with all orders of the Trial Court, and the Petitioner fails to cite any evidence in the record to the contrary. Furthermore, the Petitioner fails to identify any order of the Trial Court which she appealing. The record demonstrates that it was the Petitioner that repeatedly failed to fulfill her discovery obligations.[1]

The Petitioner had over two years to conduct her discovery. She deposed every individual that she sought to depose. Curiously, despite her RICO theories, she never served a notice of taking deposition on Allfirst. Allfirst gave the Petitioner two

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1. Allfirst had to obtain an order of the Trial Court to depose the Petitioner. Allfirst filed a motion to compel responses to its second set of interrogatories and request for production of documents. The Trial Court, Smith, J., granted the motion to compel at the January 10, 2001, hearing. Subsequently, the Petitioner failed to comply with the Trial Court order compelling discovery responses. Allfirst then filed a motion for sanctions for failure to answer the discovery, but that motion was never heard by the Trial Court. Finally, the Petitioner failed to designate any expert witnesses during the twice extended discovery period, and instead, sought to designate multiple expert witnesses at the second pretrial conference on January 10, 2001. The Trial Court, Smith, J., allowed the Petitioner to designate one expert witness at the pretrial conference, but the Petitioner never actually designated an expert witness.

complete operational policy manuals and all account records relating to the account at issue. The Petitioner was given the personnel files that Allfirst possessed for the former employees involved with this situation. The Petitioner had over five years to conduct her own investigation of the matter. Despite her efforts, the Petitioner never produced any evidence, in discovery or at trial, that Allfirst mishandled the certified check intentionally or engaged in any conduct intended to cause her harm.

Based on a review of the Petitioner's first counsel's motion to withdraw, it is clear that in 1999 the Petitioner believed that she had RICO claims. *See* Motion to Withdraw Appearance of Counsel attached hereto and incorporated herein by reference as Exhibit 1. Therefore, it is disingenuous for the Petitioner to now argue that she could not plead her RICO claims until she received the entire Allfirst operational policy manual.

The Petitioner also fails to identify what specific Trial Court order she contends was in error. It follows that the Plaintiff fails to demonstrate how the Trial Court abused its discretion. *Fisher v. State*, 128 Md. App. 79, 131, 736 A.2d 1125 (1999) (stating the trial judge is afforded broad discretion in resolving discovery disputes and will be overruled only if that discretion is abused); *Beck v. Beck*, 112 Md. App. 197, 210, 684 A.2d 878 (1996); *North River Ins. Comp. v. Baltimore*, 343 Md. 34, 47-48, 680 A.2d 480 (1996); *Tretick v. Layman*, 95 Md. App. 62, 619 A.2d 201 (1993) (stating failure to inform appellate court as to whether any motion to compel was filed and failure to identify any particular ruling of the trial court in the extract does not preserve the issue for appeal).

b. The Petitioner's Assertion is Illogical.

In the Petition, the Petitioner states that the Second Amended Complaint drew upon the material which the Petitioner received belatedly due to the Bank's efforts to thwart discovery. As evidenced by the words of the Petitioner's own

counsel, that is simply a false statement. Although the Petitioner contends in the Second Amended Complaint that the Allfirst 1995 operational policy manual on commercial accounts was not in compliance with the UCC, that issue is irrelevant.[2] It is irrelevant because the Petitioner is arguing that Allfirst's conduct violated the UCC, not that it violated its own policy manual. Therefore, whether or not the Petitioner ever obtained the policy manual is irrelevant.[3] She only needed the UCC to determine whether Allfirst's handling of her account violated the UCC. She did not need the policy manual.

The Petitioner has had the UCC available to her since October of 1995 when the relevant events occurred. Accordingly, as of October 16, 1995, the date on which she reviewed her account statements and the mistake was discovered, the Petitioner had all of the information she needed to determine whether or not Allfirst violated the UCC, and if so, how. Therefore, the statute of limitations began to run on October 16, 1995, and there is no discovery rule issue in this case.

v. The Petitioner would be barred by res judicata from seeking punitive damages and by collateral estoppel from pursuing the new claims set forth in the amended complaints in a new trial.

The significance of the Amended Complaint and the Second Amended Complaint is that the Petitioner alleges the same

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2. That issue was not an issue at trial and it has never been determined whether or not the 1995 Allfirst operational policy manual relating to commercial accounts was in compliance with the UCC. In August of 1998, Allfirst, in the process of acquiring another bank, and at a total cost in the millions of dollars, implemented a New Year 2000 compliant computer system and a corresponding 1998 operational policy manual replacing the 1995 manual.

3. The Petitioner fails to inform this Court that Allfirst had provided her the portions of the 1995 manual relating to certified checks. Upon order of the Trial Court, Allfirst provided its entire 5 volume 1995 manual and its entire 2 volume 1998 manual.

underlying breach of contract and wrongful dishonor by Allfirst, but now she alleges that Allfirst's conduct was intentional, based upon racial animus, constitutes bank fraud and was a violation of RICO. There are no specific allegations in either amended complaint to support these theories of recovery and there is no evidence in the record, no evidence offered at trial and no evidence cited in the Petition to support these theories of recovery.

The Petitioner repeatedly states in a conclusory manner that the violation of the UCC was "a knowing, willful violation." UCC section 4-402 allows a claimant to seek punitive damages for intentional misconduct and intentional harm. *Siegman v. Equitable Trust Co.*, 267 Md. 309, 297 A.2d 758 (1972); *Kendall Yacht Corp. v. United California Bank*, 50 Cal.App.3d 949, 123 Cal. Rptr. 848, 17 UCC Rep. Service 1270 (1975). The Petitioner did not meet her burden at trial of proving that the mishandling of the certified check by Allfirst Bank was intentional. Judge Lombardi made an explicit finding that there is no evidence of any intentional misconduct and he made an explicit finding that no representative of Allfirst knew about the mistake until October 16, 1995, the day the Petitioner went to the bank to determine the nature of the problem with her account. Furthermore, the Trial Court found that Allfirst did all that it could do within its power to rectify the situation and to make the Petitioner whole. In the Petition, the Petitioner does not cite any evidence in the trial record or obtained through discovery suggesting or demonstrating that the violation was knowing or willful. In this appeal, the Petitioner is asking this Court to give her another trial on the Second Amended Complaint, but she is not challenging the Trial Court's findings.

The principle of *res judicata* will bar the Petitioner from seeking punitive damages at a second trial. *Walls v. Bank of Glen Burnie*, 135 Md. App. 229, 244-46, 762 A.2d 151 (2000) (stating "in order to serve the interests of finality and avoidance of piecemeal and repetitive litigation among the same parties,

the doctrine of *res judicata* holds that all claims that a plaintiff actually brought and could have brought based on the same operative set of facts are barred"); *Chaires v. Chevy Chase Bank, F.S.B.*, 131 Md.App. 64, 74-77, 748 A.2d 34 (2000); *Colandrea v. Wilde Lake Community Ass'n, Inc.*, 361 Md. 371, 387-93, 761 A.2d 899 (2000); *Alvey v. Alvey*, 225 Md. 386, 390-91, 171 A.2d 92 (1961). The Petitioner had the opportunity to allege and prove intentional wrongdoing and to claim punitive damages pursuant to her UCC section 4-402 claim set forth in the Complaint, and she failed to do so.

In a new trial, the Petitioner will be *collaterally estopped* from attempting to prove that Allfirst intentionally caused her harm. *Colandrea v. Wilde Lake Community Ass'n, Inc.*, 361 Md. 371, 387-93, 761 A.2d 899 (2000) (stating when an issue of fact is litigated, and the determination of the issue is essential to the final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim). Intention and knowledge are essential elements of the new causes of action set out in the Second Amended Complaint. The factual issue of whether or not the harm caused to the Plaintiff was intentional was determined by the Trial Court, and the Petitioner does not contest the Trial Court findings. Therefore, the Petitioner will be *collaterally estopped* from attempting to prove that Allfirst intentionally caused her harm or deceitfully hid its mistake. Any error the Trial Court could have made regarding its striking of the amended complaints was harmless as the Petitioner will be unable to prove her new causes of action.

CONCLUSION

As set forth above, the Petition should be dismissed or denied for various reasons. First, the Supreme Court of the United States does not have jurisdiction since the Petitioner fails to present a federal question. The only issues brought before the Supreme Court relate to rules of civil procedure and discovery. Second, as set forth above, the Maryland Courts did not commit any errors of law or make any erroneous findings fact. The Petitioner simply seeks a second opportunity to prosecute her case. Even if she were given a second opportunity, she would be estopped from obtaining the relief she seeks. For the foregoing reasons, the Petition should be dismissed or denied.

WHEREFORE, the Respondent, Allfirst Bank, formerly known as the First National Bank of Maryland, respectfully requests that the Supreme Court of the United States **DISMISS** and/or **DENY** the Petition for Writ of Certiorari.

Respectfully submitted,

JAMES M. GREENAN
Counsel of Record
KEVIN M. TRACY
MCNAMEE, HOSEA, JERNIGAN, KIM,
GREENAN & WALKER, P.A.
6411 Ivy Lane, Suite 200
Greenbelt, MD 20770
(301) 441-2420

Attorneys for Respondent

APPENDIX

APPENDIX — MOTION TO WITHDRAW APPEARANCE OF COUNSEL

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

Case No.: CAL 98-20583

In re:

Kimberly Lacewell Bennett

Plaintiff

v.

First National Bank of Maryland

Defendant

MOTION TO WITHDRAW APPEARANCE OF COUNSEL

Petitioner, Glenna E. Ellis, Esquire, moves for leave to withdraw her appearance as counsel for Plaintiff, Kimberly Lacewell Bennett, in the above-captioned case. The grounds for this motion are as follows:

1. That the undersigned counsel has represented the Plaintiff in this matter since August, 1998.

2. The Plaintiff has been very combative and uncooperative with the Petitioner.

3. Furthermore, Plaintiff was insistent upon counsel filing a racketeering (RICO) claim against the Defendant in this matter which the undersigned believed was inappropriate. On this basis as well the undersigned sought to withdraw in the summer of 1999.

4. Specifically on June 29, 1999, the undersigned advised Plaintiff in writing that she was withdrawing her appearance in the case.

5. The Plaintiff has apparently moved out of state but has not advised the Petitioner as to her new address and telephone number.

6. That Petitioner has attempted to contact the Plaintiff by telephone and letter but Plaintiff failed to respond.

7. That on November 30, 1999, counsel advised the Plaintiff of her intent to petition this Court to withdraw her appearance; said notice was mailed first class, postage prepaid to: Kimberly Lacewell Bennett, 2003 Waterleaf Way, Mitchellville, MD 20721. A copy of said letter is attached hereto as Exhibit 1.

8. That the Plaintiff contacted my office on December 22, 1999 and stated that she wished me to withdraw my appearance. A copy of said letter is attached hereto as Exhibit 2.

WHEREFORE, Petitioner, moves this Honorable Court to enter an order withdrawing her appearance as counsel for the Plaintiff.

Appendix

Respectfully submitted,

s/ Glenna E. Ellis
Glenna E. Ellis
PG ID# EL0188
PO Box 4913
Largo, Maryland 20775-0913
301-386-3593
Attorney for Debtor

Appendix

Exhibit 1

Glenna E. Ellis
Attorney at Law

P.O. Box 4913
Largo, MD 20775-0913

Phone (301) 386-3593
Fax (301) 925-4070
email gellis@onebox.com

November 30, 1999

Kimberly L. Bennett
2003 Waterleaf Way
Mitchellville, MD 20721

Re: Bennett v. First National Bank of Maryland
Case No. CAL98-20583

Dear Kim:

I have tried to contact you by telephone but have not been successful. I have even left voice mail for you to call me as soon as possible, but still have not heard from you. I have heard rumors that you have relocated to Arkansas. This letter is being sent to your Mitchellville address as that is the only address that I have for you.

It is imperative that you contact me immediately regarding your lawsuit against First National Bank of

Maryland. They want to do a deposition of you but I have been unable to furnish them with dates that you would be available. Their attorney has stated that he will be filing a motion to compel you to appear at a deposition in the very near future.

In June 1999, I advised you that I would be withdrawing from your case. In one of our last conversations you stated that you had found an attorney that would be representing you at trial in this matter but preferred that I stay on the case until your deposition was completed.

Your deposition will be key to your success at trial, therefore, it would be appropriate for this individual to enter their appearance now so that they can be involved in your deposition.

Therefore, please be advised that on December 7, 1999 I will be filing a motion with the court to withdraw as your counsel in the above-referenced case. You are further advised that you should have new counsel enter an appearance on your behalf or advise the Clerk of the Circuit Court of Prince George's County, 14735 Main Street, Upper Marlboro, Maryland 20772, that you will proceed further without counsel.

Sincerely yours,

s/ Glenna E. Ellis
Glenna E. Ellis

Appendix

Exhibit 2

12/22/99

Glenna,

Please contact Kevin Tracey asap and let him know of your withdrawal. Also please file your withdrawal before the Holiday.

I will be back in contact with you in the near future to address some very serious issues.

s/ Kimberly

P.S.

My office phone number is the same as it has always been (301) 925-9091.